1983

Austin Hobbs v. The Denver & Rio Grande Western Railroad Company, And State of Utah, Department of Transportation : Brief of Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

AUSTIN HOBBS, :

Plaintiff-Appellant, :

vs. : Case No. 19019

DENVER & RIO GRANDE WESTERN RAILROAD and STATE OF UTAH DEPARTMENT OF TRANSPORTATION, :

Defendants-Respondents. :

BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, HONORABLE J. DENNIS FREDERICK, JUDGE

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[illegible] HOBBS, :

Plaintiff-Appellant, :

vs. : Case No. 19019

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IN THE SUPREME COURT

OF THE STATE OF UTAH

J. L. [illegible],

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vs.

Case No. 19019

DENVER & RIO GRANDE WESTERN RAILROAD and STATE OF UTAH DEPARTMENT OF TRANSPORTATION,

Defendants-Respondents.

BRIEF OF APPELLANT

NATURE OF THE CASE

This is a personal injury action brought by the plaintiff to recover for injuries he received when the truck he was driving was struck by a train.

DISPOSITION IN LOWER COURT

This matter was tried before the Honorable J. Dennis Frederick, of the Third Judicial District Court of Salt Lake County, sitting without a jury, on November 30 through December 3, 1982. At the conclusion of the evidence, the court found that neither defendant was negligent, and that the sole proximate cause of the accident was the negligence of the plaintiff, and entered judgment, no cause of action, for the defendants. Findings of Fact and Conclusions of Law were prepared by counsel for the Railroad. Copies of the Findings of Facts and Conclusions of Law are attached hereto as Appendix "A". The plaintiff moved to amend the Findings of Fact, and also moved for a new trial.

These motions were denied by the court in an order entered on January 13, 1983.

[illegible]

The plaintiff seeks to have the judgment of the trial court reversed, and have this matter remanded for a new trial.

STATEMENT OF FACTS

The plaintiff-appellant in this action, Austin Hobbs (hereinafter Mr. Hobbs), was a truck driver for Western Coal Carriers at the time of the accident which gave rise to this lawsuit. Mr. Hobbs had been a truck driver for Western Coal Carriers for approximately six years before the time of the accident. (Tr. 471.) During that period he had received numerous safe driving awards from Western Coal Carriers. (Tr. 475.)

On April 6, 1979, representatives of the Department of Transportation for the State of Utah (hereinafter Department of Transportation), the Denver & Rio Grande Railroad (hereinafter Railroad), and the City of Price met together to discuss and make plans for the renovation of a railroad crossing located at Carbon Avenue in the city of Price, Utah. (Tr. 190.) The Department of Transportation had prepared the roadway plan for the Carbon Avenue crossing. (Tr. 169-70.) A copy of a portion of Exhibit P25 is a map of Price City, and is attached hereto as Appendix "B".

One of the purposes of the above-described meeting was to determine what should be done with the Carbon Avenue traffic (approximately 11,000 vehicles per day (R. 251)) during the construction of the Carbon Avenue crossing. Several alternatives

were discussed in the meeting. The railroad proposed that the traffic be detoured to First West because First West was already [illegible] crossing, that is, it already had in place flashing [illegible] that would warn of the approach of a train. (Tr. 284, [illegible]) The Department of Transportation proposed that the traffic be detoured to First East in Price. (Tr. 284.) The First East crossing did not have the crossing safety or warning devices that were present at either First West or Carbon Avenue. (Tr. 203.) The traffic load at the First East crossing prior to the detour was approximately 230 vehicles per day. (Tr. 251.) The other alternative was to move the traffic through the Carbon Avenue crossing while the construction was in process, without utilizing a detour. (Tr. 192.)

The Department of Transportation had the ultimate and final decision with respect to the detour, and decided that the First East crossing would be used. (Tr. 218-19.) There was some discussion with respect to whether additional safety or warning devices would be placed at the First East crossing while the detour and construction at Carbon Avenue were in process. The Department of Transporation again made the final decision that no additional safety or warning devices would be placed at the crossing. (Tr. 219.) The railroad acquiesced in the decision to detour the traffic to First East. (Tr. 286.) The Railroad felt, however, that a flagman should be present at the First East crossing during the pendency of the detour and, accordingly, one was stationed there. The flagman was not, however, posted at the crossing during the night but only during the day. (Tr. 341.)

Mr. Alire of the Railroad had indicated that it would not be necessary to have a flagman present [illegible] consequently, there was no flagman present when Mr. Hobbs [illegible] the presence of an approaching train at the time of the accident. (Tr. 58.) The railroad put a "slow order" into effect during the pendency of the construction, which in effect required the trains going through Price to reduce their speeds from the normal 40 m.p.h. down to 30 m.p.h. (Tr. 364.)

A diagram of the First East Crossing is set forth in Appendix "C". The distance from the beginning of the crossing to the point of impact, traveling in the direction that Mr. Hobbs was traveling, is approximately 106 feet. At the speed of 3 m.p.h. (Tr. 488), it would have taken Mr. Hobbs approximately 24 seconds to traverse that distance.

The construction and detour on the Carbon Avenue crossing commenced on April 23, 1981. (Tr. 300, 318-19.) On that same day, Mr. Hobbs was working an afternoon shift driving a coal truck for Western Coal Carriers. His work period on the day of the accident commenced at approximately 1:00 p.m. (Tr. 479.) His work on that day consisted on hauling coal from various mine locations to the site locations of the various coal users who utilized the services of Western Coal Carriers. Much of this work was confined to eastern and southern Utah. (Tr. 112-14.) The distance driven by Mr. Hobbs on the day of the accident was approximately 200 miles. (Tr. 116.)

Mr. Hobbs approached the First East railroad crossing where the accident took place at approximately 10:00 p.m. (Tr. 107.)

A copy of Exhibit P7, which is a diagram of the First East [illegible], is attached hereto as Appendix "C". As Mr. Hobbs [illegible] and proceeded to cross the tracks he had to go very [illegible] because the tracks were rough and uneven. (Tr. 487-88.) The speed at which Mr. Hobbs was able to cross the railroad tracks was only about 3 m.p.h. (Tr. 488.) Mr. Hamilton of the Department of Transportation testified that railroad crossings are dangerous if they cannot be crossed at a safe speed. (Tr. 166.) He also testified that a loaded truck should be able to cross a crossing at approximately 30 m.p.h. in order to be safe and prudent. (Tr. 182.)

As Mr. Hobbs proceeded across the tracks, any vision that he might have had down the tracks was obscured by various objects. The objects consisted of a box car parked about 150-300 feet east on the side rails at the crossing (Tr. 53, 343), a house, a shed, a large tree in foliage, and a car or van. (Tr. 60.) Mr. Hobbs could not clearly see up the tracks, because of the obstructions, until after he was beyond the third set of tracks on the railroad crossing. (Tr. 61.) Mr. Hobbs testified that the front steering axle was just going across the track when he saw the light on the train and heard the whistle. (Tr. 488.)

Mr. Harvey, who was a supervisor, or road forman of equipment for the railroad, was in the lead engine of the train on the night of the accident for the purpose of observing the crew members. (Tr. 559-60.) Mr. Harvey testified that he first saw Mr. Hobbs truck after it had moved past the warning signs, at which it was supposed to stop, but didn't. (Tr. 582-84.) He

further testified that he did not believe Mr. Hobbs' behavior, in proceeding onto the tracks notwithstanding a train was approaching, was unusual, because an approaching truck driver could not see trains on the main line track until after he was already well across the crossing. (Tr. 585.) Mr. Harvey assumed that Mr. Hobbs would stop his truck on the crossing, but short of the main line track, and wait for the train to pass, notwithstanding he would then be directly in the path of any trains which may be approaching on any of the other tracks. (Tr. 586-87.) Mr. Harvey did not notify the engineer that Mr. Hobbs' truck was on the track until the train was only 150 feet from the point of impact. (Tr. 568.)

Mr. Leonard, the front end brakeman on the train involved in the accident, testified that the train was only approximately 50 feet away from the truck when he first saw it and started taking action to stop the train. (Tr. 432.) Mr. Ganser, the engineer, had previously seen the truck when the train was about 150 feet from the crossing, but took no action other than blowing the whistle. (Tr. 405-06, 426.) As described above, Mr. Harvey, who was conducting an observation test of the train crew, saw the truck even before Mr. Ganser and observed that he hadn't stopped at the crossbucks, but did not attempt to warn the train crew until the train was about 150 feet from the crossing. (Tr. 565-68, 582-88.) It was necessary for Mr. Leonard, the front brakeman, and Mr. Harvey, an observer in the cab of the train engine, to yell to Mr. Ganser, the engineer on the train, in order to warn him that the truck was on the tracks. (Tr. 432.) Mr.

Conset testified that the console in the cab of the engine constituted somewhat of an obstruction of vision to the left for the [illegible]. (Tr. 399.)

When Mr. Hobbs saw the train he accelerated in an attempt to get the cab of the truck off of the tracks before the train struck him. (Tr. 489.) The train hit the truck just behind the cab. (Tr. 490.) After the collision, the train proceeded a full block west to the Carbon Avenue crossing before it came to a stop. The cab of the truck was impaled on the front of the engine from the time of the collision until it came to rest a block west of the accident. (Tr. 47-48.) Because of the severely damaged condition of the cab of Mr. Hobbs' truck, it took nearly an hour for the emergency personnel who arrived on the scene to extricate Mr. Hobbs from the truck. (Tr. 48.)

Officer Douros of the Carbon County Sheriff's office testified that, after he conducted a full investigation of the accident, no citation was issued to Mr. Hobbs with respect to the accident. (Tr. 74.)

Mr. Hobbs was taken to a hospital as soon as he was removed from the truck and he was treated for a fractured pelvis, fractured ribs, and a punctured lung. (Tr. 90.) On September 29, 1980, Mr. Hobbs underwent back surgery as a consequence of the accident. (Tr. 84, 80.) Dr. Robert H. Lamb testified that Mr. Hobbs had sustained a 20% permanent partial injury as a result of the accident. (Tr. 84.) Mr. Hobbs still suffers from a great deal of pain and has been substantially limited in his activities because of the accident. (Tr. 545-46.)

POINT I

DEFENDANT DENVER & RIO GRANDE WESTERN RAILROAD COMPANY HAS A DUTY OF CARE TO MAINTAIN A SAFE RAILROAD CROSSING, AND HAS BREACHED ITS DUTY AS A MATTER OF LAW.

Utah Code Ann. § 56-1-11 (1974) states that "[e]very railroad company shall be liable for damages caused by its neglect to make and maintain good and sufficient crossings at points where any line of travel crosses its road." The question of what constitutes a "good and sufficient" crossing was interpreted in Denkers v. Southern Pacific Co., 52 Utah 18, 171 P. 999 (1918):

> The court, in a case of this kind, might properly charge the jury in general terms that a good and sufficient crossing is a crossing that is sufficient and ordinarily safe for the traveling public to pass to and fro over it, keeping in mind its location, whether in a sparsely settled or populous locality, and the character and volume of the traffic that ordinarily may be expected to pass over it.

171 P. at 1002.

In Bridges v. Union Pacific Railroad Co., 26 Utah 2d 281, 488 P.2d 738 (1971), the Utah Supreme Court denied recovery to the plaintiffs in a wrongful death action when their nineteen year old son was hit by a train, but, in the decision, spelled out the tests which must be applied to determine the safety of railroad crossings:

> To authorize a jury to find negligence on the part of the railroad in not taking additional precautions, there must be evidence to indicate that the crossing was more than ordinarily hazardous, i.e., there must be something in the configuration of the land, or in the construction of the railroad, or in the structures in the vicinity, or in the nature or amount of the travel on the highway,

> or in other conditions, which renders the warning employed at the crossings inadequate to warn the public of danger.

[illegible] at 738. All the physical surroundings must be evaluated to determine whether a particular crossing is abnormally dangerous. These factors include those mentioned in both the Bridges and Denkers cases.

The case of Newman v. Missouri Pacific Railroad Co., 547 F.2d 439 (5th Cir. 1977), evaluated the physical conditions of a railroad crossing where a train-car collision occurred at night. The driver of the car approached the crossing at a speed of 30-40 m.p.h. and did not stop at a stop sign properly posted at the crossing. The train, which was dark in color, was approaching the crossing and the train crew was ringing the train's bell and blowing its horn. The locomotive's lights were shining as well. In addition, a temporary flashing red light had been installed over the traffic, although it was not a typical railroad semaphore. In finding that the railroad crossing was unsafe and that the defendant railroad company had a duty to warn, the court said:

> We begin with the principle that failure to stop at a railroad as required by law "shall not of itself defeat recovery . . . ."
>
> . . . . Finding that the horn was sounding and the bell was ringing but that the plaintiff did not hear them, and assuming that the red flashing light was working, the district court ruled that these warnings were not sufficient under the circumstances. We hold that under Mississippi precedent this conclusion was not in error.

545 F.2d at 443 (emphasis added).

In the instant case, the undisputed facts imposed a duty on the railroad as a matter of law to make the intersection safe. In ruling on this case, the trial court said: "The court is of the view and finds that the plaintiff's conduct in failing to see or recognize the oncoming train or to hear the warning devices that were in operation was the sole proximate cause of the accident." In so finding, the court failed to evaluate the crossing in light of its dangerous condition. The following evidence was undisputed, and establishes liability as a matter of law. There were several obstructions to the plaintiff's view including a box car, trees and a junk yard. In addition, First East was a relatively unused crossing which had suddenly been converted into a highway, increasing traffic over it by 48 times. Visibility was poor because of the darkness, and there were no flashing semaphores which Mr. Hobbs was accustomed to seeing. A flagman had been stationed at the crossing, which Mr. Hobbs undoubtedly had seen early in the day, but the flagman had left the crossing, and no one was left to warn of an approaching train. The crossing to the west which previously handled most of their traffic with flashing warning lights had been deemed to be so hazardous and inadequate that the State and Railroad had elected to improve the positioning of the warning lights to overhead positions and to install a barrier arm.

Plaintiff submits that although the court found that the crossing was not extra hazardous, it failed to apply the tests established in Bridges, supra, and Denkers, supra, to make its determination. An application of those tests are as follows:

1. The configuration in the land blocked plaintiff Hobbs' line of vision. This configuration included foliage from trees and a junk yard in front of the line of sight of a driver.

2. The configuration of the railroad tracks was such that the plaintiff had to cross, at a maximum speed of 5 miles per hour, a full five sets of railroad tracks prior to safely negotiating the crossing.

3. Structures in the vicinity included homes, a metal shed, a junk yard, a van, and a box car along the side track which obstructed the plaintiff's view.

4. Testimony on the nature and amount of traffic on the highway indicated that traffic flows had increased measurably from approximately 230 vehicles per day to over 11,000 vehicles per day.

5. The State and Railroad had already determined that the same amount of traffic over an improved crossing required flashing warning lights and automated barrier arms which lower when trains approach.

6. Other conditions which contributed to the accident included the fact that the accident occurred at night and that a flagman had been posted at the crossing during the day which would give rise to an assumption that someone was protecting those crossing the railroad crossing. In addition, several accidents had previously occurred at the intersection which proved its dangerous condition, and also placed the Railroad and the State of Utah on notice of the danger. (R. 162.)

Despite the uncontested facts presented at trial which proved an extra hazardous condition at the railroad crossing under any one of the five tests promulgated by Bridges, the court in this case still found that the crossing was not extra hazardous. This finding was clearly contrary to the evidence presented and is reversible error.

POINT II

THE RAILROAD WAS NEGLIGENT IN THE OPERATION OF ITS TRAIN.

It is undisputed that the engineer did not see and could not see the truck until he was 50 to 150 feet from impact. This is because the configuration of the cab was such that he could not see forward and to the left (Tr. 399), the direction from which Hobbs was coming. Ganser was totally dependent upon warnings given him from Leonard, the front end brakeman, or Harvey, who was sitting in the same seat. Neither said anything to him up to 150 feet before impact.

The Court will take judicial notice, and it was established by proof, that at 40 m.p.h. the train is traveling approximately 60 feet per second. It is also known that there is at least 1 second involved for perception and reaction time so that the engineer had aproximately a second's notice of the impending collision in spite of the fact that the truck in its motion was clearly visible by the defendant's calculation and argument for 24 seconds.

It is clear that the Railroad had a duty to maintain a lookout for approaching automobiles. Alires v. Southern Pacific

Co., 93 Ariz. 97, 378 P.2d 913, 920-21 (1963). The train fireman in that case, who was apparently seated on the side of the engine on which the plaintiff's vehicle collided, was looking the other way and did not see the plaintiff's vehicle approaching. The court held that this state of facts would justify a jury instruction on wanton negligence.

It was clearly negligence for the Railroad in the instant case to:

a) Operate a train at any speed which did not afford the engineer a clear view to the left and right.

b) To operate a train at 40 m.p.h. or 30 m.p.h. at this location and under these circumstances.

The trial court's findings that the Railroad was 100% negligence free was contrary to the clear weight of the evidence and should be reversed.

POINT III

THE STATE OF UTAH HAD A DUTY TO MAINTAIN A SAFE RAILROAD CROSSING.

The trial court in its decision stated that the State of Utah was not negligent and failed to reach the question of whether the State was immune from suit under the governmental immunity doctrine. Because the issue of governmental immunity was never reached, only a general discussion of negligence principles as they apply to the State is necessary.

The plaintiff contends that the State was largely responsible for the repair work being conducted at the intersection where the accident occurred, and that it is subject to the same

standard of care as is the Railroad. The Utah Department of Transportation officials made the final decision as to where to route traffic, and also made decisions on the warning devices to be employed. In a long line of Utah cases, the Supreme Court of Utah has adopted the philosophy that a political entity may be held liable for actions or inactions in traffic control which endanger the public. See Bigelow v. Ingersol, 618 P.2d 50 (Utah 1980); Carroll v. State, 27 Utah 2d 384, 496 P.2d 888 (1972); Bramel v. State Road Commission, 24 Utah 2d 50, 465 P.2d 534 (1970). The defendant State of Utah had the same responsibility as the Railroad to evaluate the condition of the crossing, according to the Bridges tests, and to adequately protect the crossing where increased traffic would be occurring because of its detour.

POINT IV

THE TRIAL COURT ERRED IN ITS FINDINGS AND ALLOCATION OF NEGLIGENCE.

Appeal courts are reluctant to reverse trial decisions on factual grounds, and are only willing to do so when the weight of the evidence is clearly contrary to the judgment. Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972). The allocation of negligence is also a factual issue. Buttrey Food Stores Division v. Coulson, 620 P.2d 549 (Wyo. 1980).

The trial court or the appeals court may, however, in comparative negligence cases, review the percentage allocations of negligence by the finder or fact, and impose its own allocation of fault to comform to the evidence at trial. Mazo v. Malone, 407 A.2d 310 (Me. 1979). In the case of Kinsey v. Kelly, 312

So.2d 461 (Fla. App. 1975), the plaintiff was driving a motorcycle towards an intersection with a traffic signal, and the defendant, who was driving in the opposite direction in an automobile, attempted to make a left hand turn in front of the plaintiff. The plaintiff had seen the defendant pull out into the intersection and stop, and plaintiff thought that the defendant was going to wait for him to pass through the intersection. Instead, the defendant turned in front of the motorcycle which collided with the defendant's car. At trial the jury found that the plaintiff was 100% negligent, and that the defendant was 0% negligent. The appeals court reversed the decision by saying:

> The case was tried on comparative negligence. By its verdict for the appellee, the jury necessarily considered that she was without negligence which was a legal cause of the accident, and that appellant's negligence was 100%.
>
> While the trial and appellate courts are not authorized to substitute their judgment for that of the jury on disputed questions of fact, a new trial should be granted when the verdict is against the manifest weight of the evidence. Here, the record clearly shows at least some degree of negligence on the part of the appellee. We therefore, find that this verdict was against the manifest weight of the evidence and that the trial judge abused his discretion in denying appellant's motion for a new trial.

312 So.2d at 462 (emphasis added).

This case is similar to the Kinsey case in that, viewing the undisputed facts presented at trial, as a matter of law there was at least some degree of negligence on the part of defendant Denver & Rio Grande Western Railroad and the State of Utah. The increased traffic, the obstructions to view, the absence of the flagman,

the dark color of the train, the inadequate warning signals all indicate at least some negligence on the part of the defendant. The allocation under comparative negligence of 100% negligence to the plaintiff and 0% negligence to the defendant was clearly against the weight of the evidence.

Another case where the reviewing court reversed on the percent allocation of negligence is Lawver v. City of Park Falls, 35 Wis. 2d 308, 151 N.W.2d 68 (1967). In Lawver, the plaintiff was forced to walk as a pedestrian in the snow covered streets because defendant Park Falls City had failed to plow the side walks. While walking on the street, the plaintiff stepped on a large piece of ice, and fell, injuring her ankle. The plaintiff brought a negligence action against the City, and the jury found that she was 75% negligent, the City 25% negligent, and she was denied any recovery under the Wisconsin comparative negligence statute. The Supreme Court of Wisconsin reversed the case based on the erroneous allocation by the jury, and said:

> There is no question the City was negligent in not plowing or shoveling the snow on the north sidewalk, but we cannot agree with the plaintiff's contentions that she could not be negligent in her manner of walking or in her position in the street because she was forced to walk there. . . .
>
> However, the apportionment of negligence is such that it cannot be sustained. We think as a matter of law that 75% causal negligence attributable to a pedestrian forced to walk in the public street and who stumbles over ice ruts is unreasonably disproportionate to the negligence of the City in failing to keep its sidewalks shovelled. . . .
>
> Here we think the apportionment of negligence cannot be sustained either on the evidence or as a matter of law. While it can

> be argued that public sidewalks in small towns in the far north which are subject to frequent snow falls and little pedestrian traffic cannot be kept as clean of snow as city streets in a metropolitan city in southern Wisconsin, nevertheless, a City does have the duty to keep its sidewalks reasonably safe under all the conditions for pedestrian traffic.

151 N.W. at 70.

There is no question that the Railroad and the State had a duty to make the railroad crossing safe. Utah Code Ann. § 56-1-11 (1974). The factual circumstances discussed above prove that the failure of the defendants to remedy certain conditions was a breach of their duty of care. In Lawver, the plaintiff had a duty to look and did not see the obstructions that caused her fall. This duty, however, did not preclude her from recovering or make her action completely negligent, nor did it even sustain a negligent allocation of 75% to her and 25% to the defendant City.

In the instant case, the plaintiff had a duty to stop, look and listen. Some negligence on plaintiff Hobbs' part, however, does not conclusively establish a bar to his recovery. The very purpose of comparative negligence was to prevent the harsh results of the contributory negligence doctrine which denied a plaintiff recovery when fault ought to be fairly allocated among the parties. Rigtrup v. Strawberry Water Users Association, 563 P.2d 1247 (Utah 1977). In this case, despite undisputed fault by the defendants, the tinder of fact failed to allocate fault among the parties but simply determined that because plaintiff Hobbs did not see the trian, his own negligence was the sole proximate

cause of the accident and his own injuries.

In a wrongful death action with facts very similar to this case, Scovill v. Missouri, 458 F.2d 439 (8th Cir. 1972), two people were killed in a car-train collision at a railroad crossing. The Eighth Circuit said that the crossing in question was extensively used, citing traffic of 1,356 cars and 17 trains daily. The crossing was only protected by standard crossbucks and a red stop sign. The driver of the car stopped before reaching the first track, but the crossing had multiple tracks and he did not stop for each track. Several sight obstructions and the angle of the sun blocked the driver's vision, and his car was struck by the defendant's train while he attempted to cross the tracks.

At trial there was disputed evidence as to whether the defendant's train was sounding the required warnings. The plaintiffs also contended that the crossing was extra hazardous based on the inadequacy of the warnings and the obstructions to the driver's view. The jury returned a verdict for the plaintiff and the defendant appealed.

On appeal, the defendant argued that because the Arkansas statute required a stop between fifteen and fifty feet before a railroad track, that the plaintiff was negligent per se. The appeals court rejected this argument:

> A significant facet of this argument is that Thomas approached the crossing charged, under § 75-637, n. 3 supra, with the duty of bringing his automobile to a stop within fifty feet and not less than fifteen feet of the nearest rail. We already have observed that this statutory duty does not become applicable unless the railroad emits an audible signal from a distance of not less than fifteen hundred feet of the crossing, or

> unless the train is plainly visible. In view of the controversy on the signal issue, and because a violation of the statute can amount only to some evidence of negligence, see, for example, Bussell v. Missouri Pacific Railroad Co., 237 Ark. 812 376 S.W.2d 545, 548 (1964), we are unable to view the statue as one having dispositive significance.

458 P.2d at 646 n. 15 (emphasis added).

The Arkansas statute is very similar to the statute in Utah requiring the plaintiff to stop between 15 to 50 feet from a railroad track. Any negligence by the plaintiff Hobbs of not stopping, or failing to see the train, is not conclusive as to his negligence. All other factors needed to be considered, including those factors already cited which would contribute to the extra hazardous condition of the railroad crossing.

In this case, instead of evaluating the circumstances, the findings of fact are devoid of any factual finding other than a statement that the plaintiff had clear vision towards the train during a short period of time that the intersection was safe. There was no finding as to the increase in traffic, the specific sight obstructions, the color of the train, or the flagman who had previously been employed, etc. Yet the court held that the crossing was not hazardous as a matter of law. This was clearly an abuse of discretion on the part of the trial court and warrants a reversal.

CONCLUSION

Mr. Austin Hobbs was struck by a train at the First East crossing in Price. The trial court determined that the Railroad and the State were absolutely without fault with respect to the

accident, and that the sole cause of the accident was the negligence of Mr. Hobbs. The trial court's determination is clearly erroneous. The evidence clearly established that [illegible] railroad crossing this wide has to be traversed at least 30 m.p.h. even by heavy trucks. The First East crossing was so rough that the maximum speed for a loaded truck was approximately 5 m.p.h. Numerous objects blocked Mr. Hobbs' view.

The appellant acknowledges that there were times when Mr. Hobbs was between obstructions and perhaps could have seen the engine lights on the train had he been looking in that direction at that time; however, Mr. Hobbs obviously did not know from which direction a train might be coming, and he was required to look in numerous other directions during the 24 seconds he was crossing the tracks. Because of the dark color of the train, only the engine lights would have been visible. The opportunity to catch a brief glimpse of the engine of the train if one happened to be looking in the right direction is simply not enough, as a matter of law, to absolve the Railroad and the State from liability for failure to remove the obstructions from the crossing or to install lights or other devices which would warn persons of an approaching train.

The evidence also clearly established that the Railroad was negligent, and the trial court's ruling to the contrary was against the clear weight of the evidence. The evidence showed that some of the train personnel were aware of the truck substantially before the collision, but failed to take any action to prevent a collision. In addition, the design of the train engine

was such that the vision of the engineer was obstructed so that he did not have a clear view of approaching vehicles, and he consequently did not see Mr. Hobbs approaching until it was to late to stop the train.

Based upon the foregoing, the appellant respectfully requests that the decision of the trial court be reversed, and the case remanded for a new trial.

DATED this 15th day of August, 1983.

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MAILED two copies of the foregoing to Mr. E. Scott Savage, Esq., 50 South Main Street, Suite 1600, P.O. Box 3400, Salt Lake City, Utah 84110, and to Mr. Stuart L. Poelman, Esq., P.O. Box 3000, Salt Lake City, Utah 84110, postage prepaid, this 18th day of August, 1983.

Michelle Farmer

SECRETARY

APPENDIX "A"

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

AUSTIN HOBBS, Plaintiff, vs. THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY; and STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No. C-80-5688

On November 30 through December 3, 1982, this matter was tried before the Honorable J. Dennis Frederick of the above-entitled Court, sitting without a jury. Jackson B. Howard represented Plaintiff. Alan L. Sullivan and Jeffrey E. Nelson represented defendant The Denver & Rio Grande Western Railroad Company (the "Railroad"). Stuart L. Poelman represented defendant State of Utah, Department of Transportation (the "DOT").

Plaintiff called the following witnesses to testify on his behalf: Steven Douros, Dr. Robert Lamb, Reese Blackhurst, Archie Hamilton, Gerald Leonard, Martin Ganser, Austin Hobbs, and Betty Hobbs. Plaintiff also read into the record all or part of the depositions of Arland Esklund, Chad Chesnut, John Cole, and Dwayne Russell. The Railroad called James Harvey,

Cameron E. Hansen, Heza Ellington, and Trina Pillow as witnesses on its behalf. The DOT called no witnesses on its behalf. In addition to the testimony of the witnesses, numerous exhibits were introduced into evidence.

On the basis of the testimony and evidence adduced at trial, the Court makes the following findings of fact:

FINDINGS OF FACT

1. At about 10:00 p.m. on April 23, 1979, while driving a coal-hauling tractor-trailer truck in connection with his employment, Plaintiff was involved in a collision with one of the Railroad's trains at the Railroad's crossing located between Second and Third South on First East in Price, Utah.

2. The First East crossing is composed of five sets of tracks. The northernmost of these tracks is the active or "mainline" track. It was on this track that the collision occurred. The tracks approach First East from a slightly east-southeasterly direction. The mainline track is straight for more than three-quarters of a mile to the east of the First East crossing.

3. The Railroad's tracks also cross Carbon Avenue in Price. On the day of the accident, the Carbon Avenue crossing was closed because of repair work being performed there at the direction of the DOT. The DOT detoured traffic from Carbon Avenue to First East to permit Railroad and DOT crews to complete the work, which was to take about three to five days.

4. The DOT made the decision to detour traffic from Carbon Avenue to First East. The decision was made after a meeting called by the DOT on April 6, 1979, attended by representatives of the DOT, the Railroad, and Price City. At the

meeting, it was determined that it would be impractical to permit traffic to continue across the Carbon Avenue crossing during the construction. Another alternative considered at the meeting was that traffic be diverted to First West. However, the DOT decided to detour traffic to First East for several reasons, including, but not limited to, the following: (1) there was less existing traffic on First East than on First West; (2) the housing and population of children were less dense on First East; (3) the turns along the First East detour route were easier to negotiate, particularly for large coal trucks; and (4) the First East crossing was in better condition and could more easily accommodate the additional traffic, including the large coal trucks. The chosen detour diverted traffic traveling northbound on Carbon Avenue right (east) on Third South, left (north) on First East across the tracks to First South, left (west) on First South, then right (north) on Carbon Avenue.

5. Before the construction began, the warning signals at the First East crossing consisted of white "crossbuck" signs that had been there for many years. The DOT installed additional yellow railroad warning signs before the detour was imposed. The Railroad imposed a "slow order" during the construction, requiring its trains to reduce their speed from 40 m.p.h. to 30 m.p.h. from milepost 619.0 to 619.5 during the period of the construction. Milepost 619.0 was located about 100 feet east of the First East crossing, and milepost 619.5 was located one-half mile west of milepost 619.0.

6. The train crew in the lead engine on the night of the accident consisted of the engineer (Martin Ganser), the

head brakeman (Gerald Leonard), and the road foreman of equipment (James Harvey). Mr. Harvey's duties included the supervision and evaluation of the Railroad's crews, and he was seated in the lead engine on the night of the accident for the purpose, among others, of observing and evaluating the crew's performance.

7. As the train approached Price on the night of the accident, the train engineer reduced the speed of the train from approximately 60 m.p.h. to 40 m.p.h. or less in accordance with the applicable Price City ordinance. The train engineer further reduced the speed of the train to 30 m.p.h. or less at milepost 619.0 in accordance with the Railroad's slow order.

8. As the Railroad's train approached to within a quarter mile of the First East crossing, its locomotive bell was ringing, the fixed and oscillating headlights on the front of its locomotive were burning, and the train engineer sounded the standard whistle signal, composed of two long blasts followed by one short blast and one long blast.

9. On the night of the accident, Plaintiff drove north on Carbon Avenue, then followed the detour route that led him east on Third South, then north on First East. Plaintiff knew that the northernmost track was the mainline track and he was acquainted with the First East crossing because he crossed it traveling south earlier on the day of the accident. Furthermore, Plaintiff had crossed the Carbon Avenue crossing frequently during the six years he had worked for his employer before the accident.

10. As Plaintiff approached the First East crossing, he slowed his truck to approximately 3 to 5 m.p.h., but failed

to come to a complete stop at any point before or on the crossing. Plaintiff had a clear view of the approaching train for at least the last 110 feet before he reached the mainline track, except for a very brief period when his view of the lead engine was obstructed by a stationary boxcar parked approximately 140 feet east of the crossing on a storage track. After passing that obstruction, Plaintiff had a clear view of the approaching train for more than 10 seconds before he reached the mainline track and with ample time to bring his truck to a stop. Plaintiff proceeded across the crossing at approximately 3 to 5 m.p.h. and either failed to look or listen for the train or failed to heed what he saw or heard as the train approached.

11. James Harvey, who was sitting in the left front seat of the train engine cab, saw Plaintiff's truck approaching the crossing but assumed that, because the truck was decelerating and approaching the crossing so slowly, Plaintiff intended to stop. Gerald Leonard, seated behind Mr. Harvey, also saw Plaintiff's truck approaching the mainline track. When Mr. Harvey and Mr. Leonard realized that the truck was not going to stop before the mainline track, they simultaneously warned Martin Ganser. At that time, the train could not be stopped short of the crossing. Mr. Ganser saw the truck and immediately applied the train's emergency brakes.

On the basis of the foregoing findings of fact, the Court makes the following conclusions of law:

CONCLUSIONS OF LAW

1. The Railroad's crew members exercised reasonable care and were not negligent in the operation of the train on the night of the accident. The Railroad was not negligent with respect to the design of the cab in its locomotive.

2. The Railroad's crew members complied with Utah Code Ann. § 56-1-14 (Supp. 1981) by sounding the train's whistle and bell continuously for at least 80 rods (a quarter mile) before crossing the First East crossing.

3. The Railroad exercised reasonable care in maintaining the First East crossing.

4. The DOT exercised reasonable care in the choice of the detour route to First East and in the choice of crossing protections required and installed at the First East crossing.

5. The First East crossing was not an extrahazardous crossing either because of volume of traffic, or the nature of the First East crossing, or the presence of buildings or other obstructions, or because of the circumstances prevailing on the night of the accident. Therefore, neither the DOT nor the Railroad had a duty to place flagmen or additional warnings or protections at the First East crossing.

6. Plaintiff failed to exercise reasonable care in approaching and crossing the First East crossing. Plaintiff's failure to see or hear what a reasonable person could have seen or heard, or to heed what he saw or heard, constituted negligence per se. Plaintiff's negligence was the sole proximate cause of Plaintiff's accident and injuries.

7. Plaintiff failed to comply with Utah Code Ann. § 41-6-95(a) (1981) because he failed to stop within 50 feet but not less than 10 feet from the First East crossing when the Railroad's train was approaching within approximately 1,500 feet of the crossing and emitting an audible signal, and when the train, because of its speed and nearness to the First East crossing, constituted an immediate hazard; and because the

Railroad's approaching train was plainly visible and was in hazardous proximity to the First East crossing.

DATED this 27th day of December, 1982.

BY THE COURT:

District Court Judge

ATTEST
W. STERLING EVANS
CLERK
BY
Deputy Clerk

Approved as to form:

Jackson B. Howard
Attorney for Plaintiff

Stuart L. Poelman
Attorney for Defendant State of Utah,
Department of Transportation

DEPARTMENT OF TRANSPORTATIO

PLANS OF PROPOSED STATE ROAD

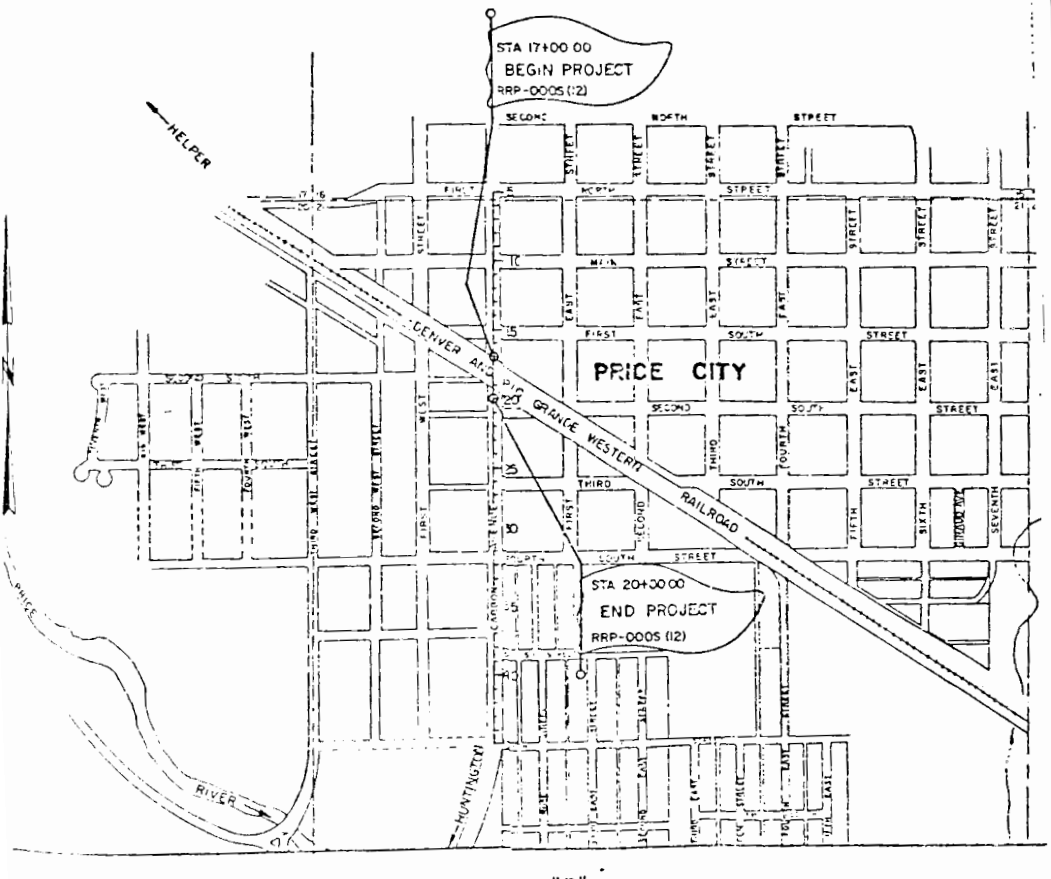
FEDERAL AID PROJECT

RAILROAD CROSSING IMPROVEMENTS IN PRICE, UTA

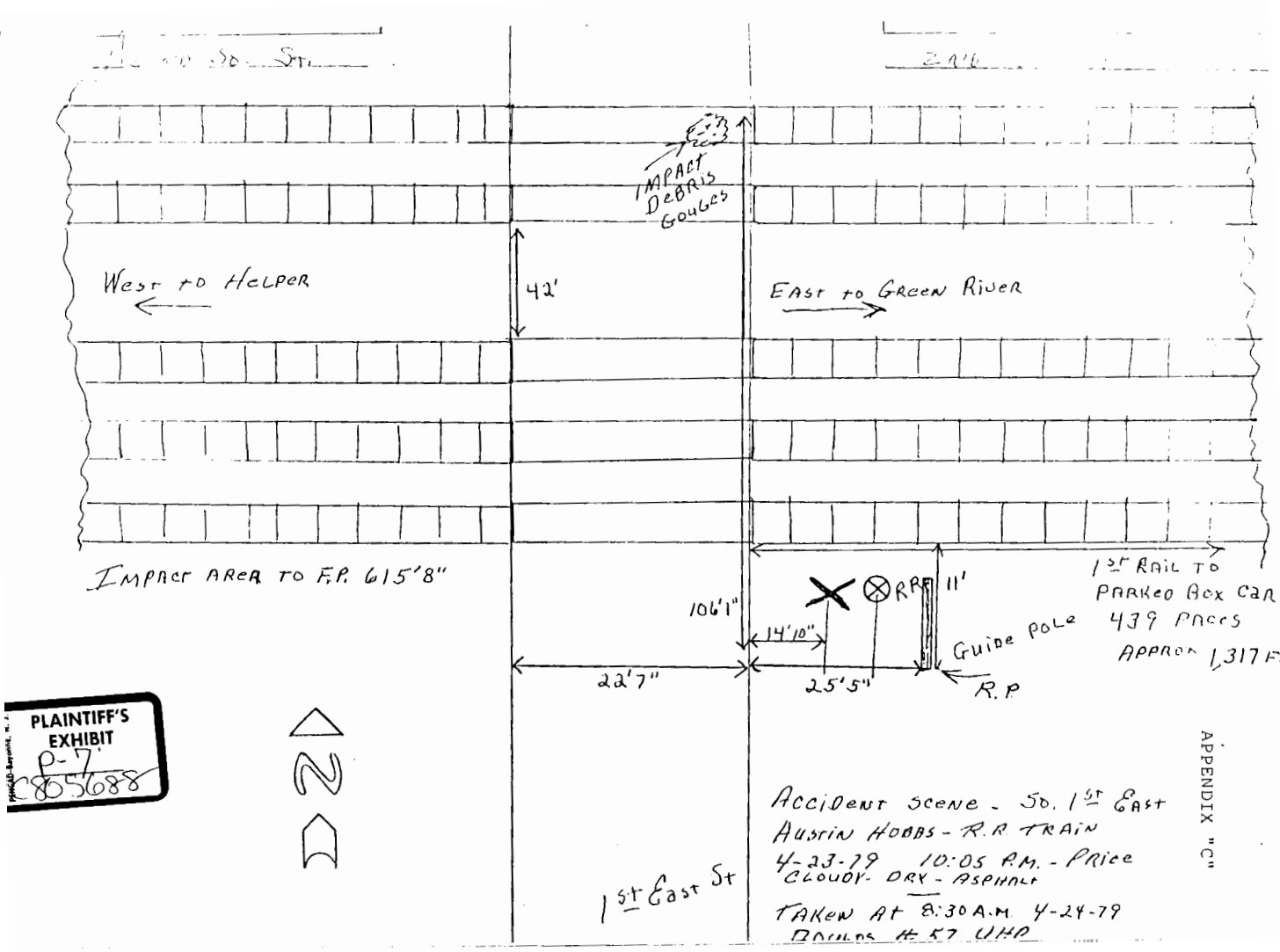
RRP-0005 (12)

CARBON COUNTY

LENGTH 0.057 MILES



APPENDIX "B"



PLAINTIFF'S EXHIBIT P-7

APPENDIX "C"